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In The

Supreme Court of the United States

October Term, 1995

SHOP 'N SAVE WAREHOUSE FOODS, INC.,

Petitioner,

vs.

UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO-CLC, LOCAL UNION NO. 88,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can a labor arbitrator, in issuing an award, ignore and expressly state he will not consider undisputed and uncontradicted evidence going to the essence of the parties' Collective Bargaining Agreement in light of the United States Supreme Court's decisions in *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960) and *United Paperworkers International Union, AFL-CIO, et al. v. Misco, Inc.*, 484 U.S. 29 (1987)?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	2
Statement of Jursidiction	2
Statutes Involved	2
Statement of the Case	5
Reasons for Granting the Writ	11
Conclusion	18

TABLE OF CITATIONS

Cases Cited:

Bakers Union Factory v. ITT Continental Baking Company, Inc., 749 F.2d 350 (6th Cir. 1984) 14, 16

Coca-Cola Bottling Company of St. Louis v. Teamsters, Local 688, 959 F.2d 1438 (8th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 635 (U.S. 1993) 10, 14

Contents

Page

International Union, United Mine Workers of America v. Big Horn Coal Company, 916 F.2d 1499 (10th Cir. 1990), *cert. denied*, 502 U.S. 1095 (1992) 10

Shop 'N Save Warehouse Foods, Inc. v. United Food and Commercial Workers International Union, Local No. 88, 61 F.3d 632 (8th Cir. 1995) 1

United Mine Workers v. Barnes Tucker Company, 561 F.2d 1093 (3d Cir. 1977) 16

United Paperworkers International Union, AFL-CIO, et al. v. Misco, Inc., 484 U.S. 29 (1987) .....i, 15, 16, 17, 18

United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593 (1960) .....i, 12, 14, 15, 18

United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574 (1960) 13

Statutes Cited:

9 U.S.C. §§ 1-16 2

9 U.S.C. § 10(a)(4) 2

9 U.S.C. § 12 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 10

Contents

	Page
29 U.S.C. § 141 *et seq.*	3
29 U.S.C. § 158(a)(5)	13
29 U.S.C. § 185(a)	3
29 U.S.C. § 185(b)	4
29 U.S.C. § 185(c)	4

APPENDIX

Appendix A — Decision of the United States Court of Appeals for the Eighth Circuit Filed July 31, 1995	1a
Appendix B — Order and Judgment of the United States District Court for the Eastern District of Missouri Filed October 14, 1994	8a
Appendix C — Order by the United States Court of Appeals for the Eighth Circuit Denying Rehearing Dated August 29, 1995	18a
Appendix D — Award of Arbitrator	19a

No.

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UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO-CLC, LOCAL UNION NO. 88,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Shop 'N Save Warehouse Foods, Inc. ("the Company") hereby petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Shop 'N Save Warehouse Foods, Inc. v. United Food and Commercial Workers International Union, Local No. 88*, 61 F.3d 632 (8th Cir. 1995).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 61 F.3d 632 (8th Cir. 1995) and is reprinted in the Appendix to this certiorari petition ("Pet. App.") at 1a-7a. The Order of the Court of Appeals denying the Company's Petition for Rehearing is unreported and is reprinted at Pet. App. 18a. The Opinion of the United States District Court for the Eastern District of Missouri granting the Company's Cross-Motion for Summary Judgment and Vacating the Arbitrator's Award is reported at 864 F. Supp. 113 (E.D. Mo. 1994) and is reprinted at Pet. App. 8a-17a. The Arbitration Decision of the Arbitrator sustaining the grievance filed by the United Food and Commercial Workers, Local No. 88 (the "Union") is unreported and is reprinted at Pet. App. 19a-43a.

STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals issued its Decision and Judgment herein on July 31, 1995. A timely Petition for Rehearing was denied by the Eighth Circuit Court of Appeals on August 29, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Uniform Arbitration Act, 9 U.S.C. §§ 1-16 provide:

> § 10(a)(4):
>
> > In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(4) where the arbitrators exceeded their powers, or so imperfectedly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

§ 12:

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in any action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

The relevant portions of the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* provide:

§ 185(a):

Suits for violation of contracts between an employer and a labor organization

representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

§ 185(b):

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

§ 185(c):

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in

which its duly authorized officers or agents are engaged in representing or acting for employee members.

STATEMENT OF THE CASE

In the Spring of 1992 the Company, which is engaged in the retail grocery business, began taking a more active approach to combatting safety hazards and promoting safety on the job. As part of its heightened commitment to safety, the Company made a decision to implement a policy requiring all hourly employees to wear back belts.

On April 8, pursuant to the Management's Rights clause of the parties' Collective Bargaining Agreement, John T. Dougherty ("Dougherty"), the Company's Vice President of Human Resources, informed the Union of the Company's intention to implement a policy requiring, as a condition of employment, that all employees wear a back belt at work. After initially challenging the mandatory nature of the Company's policy, the Union concluded it did not have a problem with the Company's decision to implement a policy which made the wearing of back belts a mandatory condition of employment.

In approximately August, 1992, the Company provided hourly employee Sam Coffey ("Grievant") with a back belt and a copy of the instructions regarding the proper use of the back belt. Initially, Grievant wore the back belt but subsequently he told the Company that it bothered his back and that he could not work with the belt on. Accordingly, Grievant stopped working. The Company scheduled Grievant to be examined by Dr. Solomon Noguera ("Dr. Noguera"), Grievant's physician. Ultimately, after examining Grievant on two (2) occasions, Dr. Noguera returned Grievant to full duty effective August 25, 1992 and determined Grievant was medically able to wear the back belt. Based on this

diagnosis, the Company informed Grievant that he was required to report to work and comply with the Company's mandatory back belt policy.

Subsequently, however, the Company received a telephone call from Ed O'Reilly ("O'Reilly"), the Union's President, regarding Grievant's ability to return to work. During this conversation, the Company and O'Reilly discussed the fact that Grievant had been returned to full duty and was diagnosed as being medically capable of wearing the back belt. O'Reilly, knowing Grievant could not return to work if he did not agree to wear the back belt, asked if the Company would agree to allow Grievant to get a second opinion as to whether Grievant was medically able to wear the back belt. O'Reilly later contacted Dougherty about the Union's request that Grievant be afforded a second medical opinion. During this conversation, O'Reilly proposed to Dougherty that if the Company would agree to allow Grievant to get a second medical opinion regarding his ability to wear the back belt, the Union would agree that the opinion of the second doctor would effectively and finally resolve Grievant's ability to wear the back belt. In response, Dougherty, consistent with federal labor policy which encourages the private settlement of labor disputes by the parties, entered into an agreement with O'Reilly that the Company would allow Grievant to be examined by a second doctor to determine his ability to wear the back belt on the express condition that the second doctor's diagnosis would finally resolve for the Union and the Company the question of whether Grievant was medically capable of wearing the back belt at work. At the arbitration hearing in this matter, Dougherty testified as follows:

> Q. (By Mr. Stewart) Okay. Please tell the Arbitrator what Mr. O'Reilly said to you and you to him?

> A. (By Dougherty) He called me concerning this letter from Dr. Noguera and asked me if the Company would consider to resolve this issue with another opinion. And I said 'If it will resolve it, certainly,' and we proceeded. I told them I'd tell Jenny Sullins to set up another independent doctor and get another opinion.
>
> Q. And what did he say?
>
> A. He said, "Fine. That should resolve it."

Dougherty also testified without contradiction that subsequently, in another conversation with Dougherty, O'Reilly stated: "He [Grievant] was more or less glad we were complying with his request to get another opinion, and that we would go with whatever the opinion was." Finally, at the arbitration hearing, Grievant himself acknowledged the existence of an oral settlement agreement between the Company and the Union:

> Q. (By Mr. Stewart) Okay. Did O'Reilly or Mrs. Adams ever tell you that they had extracted an agreement from the Company to send you to a second doctor?
>
> A. (By Grievant) Yes, I think Peggy had said something about that.

All of the above-referenced facts establishing the existence of a settlement agreement between the parties were adduced at arbitration and, despite the availability of O'Reilly, none of the evidence adduced by the Company was challenged or contradicted.

After entering into this settlement agreement with the Union, the Company arranged for Grievant to be examined by Dr. Herbert E. Rosenbaum ("Dr. Rosenbaum"), who concluded that there was nothing wrong with Grievant's back and that there was no reason why Grievant could not wear the back belt at work. Pursuant to the agreement reached between the Company and the Union, the Company fully expected Grievant to return to work wearing the back belt. Grievant, however, in direct contravention of the parties' agreement, refused to return to work wearing the back belt. Inasmuch as Grievant refused to abide by the unequivocal and express agreement reached by the parties, the Company terminated his employment on September 3, 1992.

On September 4, 1992 the Union filed a grievance alleging that the Company breached the parties' Collective Bargaining Agreement by terminating the Grievant without just cause. This grievance was processed through the grievance and arbitration procedure and submitted to arbitration before Thomas J. Erbs on March 17, 1993. At the arbitration hearing, the Company raised as a defense to the Union's grievance the parties' settlement agreement wherein the Union agreed that Grievant's ability to wear the back belt at work and, thus, comply with the Company's mandatory policy, would be resolved by the medical diagnosis of Dr. Rosenbaum. The Company's evidence in this respect was undisputed, uncontradicted and unchallenged. On June 7, 1993, Arbitrator Erbs, despite the irrefutable and undisputed existence of a settlement agreement between the parties, issued an Award finding the Company did not have just cause to terminate Grievant. With respect to the unrebutted and uncontradicted evidence adduced by the Company establishing the existence of a settlement agreement between the parties as well as the Company's argument that the parties' agreement should govern the disposition in the case, the Arbitrator found:

> On August 27, 1992, the Union President

> talked with the Human Resources Manager and asked if another medical opinion could be secured. Company evidence indicated that the Union agreed to accept the results of the examination by the third physician. The Company arranged for the Grievant to be examined by Dr. Rosenbaum, a clinical Neurologist. Dr. Rosenbaum found no evidence of medical disorder nor any reason why the Grievant could not wear the belt.

Pet. App. 23a. The Arbitrator then expressly stated that despite the unrebutted and uncontradicted evidence adduced by the Company regarding the parties' settlement, he was not going to consider the parties' agreement:

> Yet, if a settlement did take place, then it follows there would be some action to enforce a settlement rather than a submission asking the Arbitrator to decide whether the Grievant either voluntarily quit or was discharged for cause. In the absence of such a submission, the Arbitrator believes it more appropriate to base this holding on the limited power he derives from the bargaining agreement rather than to assume he can both adjudicate and enforce an undertaking to which he was not a party and which is outside the grievance procedure.

Pet. App. 41a. In reaching this conclusion, the Arbitrator ignored and expressly stated he was not going to consider the undisputed and uncontradicted evidence going to the essence of the parties' Collective Bargaining Agreement.

On June 18, 1993, the Company filed a Complaint in the United States District Court for the Eastern District of Missouri seeking to vacate the Award of Arbitrator Erbs on the grounds that the Arbitrator's Award did not draw its essence from the parties' Collective Bargaining Agreement. The United States District Court had jurisdiction over the Complaint pursuant to 28 U.S.C. § 1331. On August 12, 1993, the Company filed a Cross-Motion for Summary Judgment wherein the Company relied on the Eighth Circuit Court of Appeals' decision in *Coca-Cola Bottling Company of St. Louis v. Teamsters, Local 688*, 959 F.2d 1438 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 635 (U.S. 1993). The Company argued that the Arbitrator's Award did not draw its essence from the parties' Collective Bargaining Agreement because the Arbitrator, in issuing his Award, ignored the uncontradicted and undisputed evidence establishing the existence of a settlement agreement between the parties. On October 14, 1994, the United States District Court for the Eastern District of Missouri issued an Order and Judgment granting the Company's Cross-Motion for Summary Judgment. Pet. App. 8a-9a. In its decision, the district court held that the "Arbitrator in this case disregarded the oral settlement agreement even though such agreements are binding in arbitration." Pet. App. 16a; 864 F. Supp. at 116 (*citing Coca-Cola Bottling Company of St. Louis v. Teamsters, Local 688*, 959 F.2d 1438 (8th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 635 (1992); *International Union, United Mine Workers of America v. Big Horn Coal Company*, 916 F.2d 1499, 1502 (10th Cir. 1990), *cert. denied*, 502 U.S. 1095 (1992)).

On November 14, 1994, the Union filed a timely Notice of Appeal. In its opinion reversing the district court's ruling, the Eighth Circuit Court of Appeals acknowledged that the Arbitrator had expressly found that the Company's evidence — which was uncontradicted and the only evidence on the issue adduced at the arbitration hearing — indicated that the Union had agreed to accept the results of the examination by Dr. Rosenbaum. Pet.

App. 2a. The court then also acknowledged that the Arbitrator expressly stated he was going to ignore the parties' settlement agreement — an agreement which goes to the essence of the parties' agreement — in making his decision. Pet. App. 3a. Despite the Arbitrator's findings which, on their face, manifested an infidelity to the Arbitrator's obligation to interpret the parties' Collective Bargaining Agreement and issue an Award that draws its essence from the parties' Collective Bargaining Agreement, the Eighth Circuit expressly condoned the fact the Arbitrator refused to consider undisputed and uncontradicted evidence going to the essence of the parties' Collective Bargaining Agreement. Pet. App. 6a-7a. The Eighth Circuit concluded:

> If the Arbitrator had found that a settlement agreement had been consummated and then failed to enforce the agreement, the result would have been the same as in *Coca-Cola.* However, the Arbitrator made no such factual finding.

Pet. App. 7a. Accordingly, based on this conclusion, the United States Court of Appeals for the Eighth Circuit reversed the decision of the United States District Court for the Eastern District of Missouri and ordered that the Arbitrator's Award be enforced. Pet. App. 7a. On August 10, 1995, the Company filed a timely Petition for Rehearing which was denied on August 29, 1995.

REASONS FOR GRANTING THE WRIT

The Company's petition for writ of certiorari should be granted because the United States Court of Appeals for the Eighth Circuit allowed the Arbitrator to ignore and expressly state he would not consider undisputed and uncontradicted evidence

going to the essence of the parties' Collective Bargaining Agreement. This decision by the United States Court of Appeals for the Eighth Circuit emasculates this Court's precedent governing an arbitrator's authority to issue an award which was established thirty-five (35) years ago in *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960).

Over thirty-five (35) years ago, this Court in *Enterprise Wheel and Car* established the bench mark for review of an arbitrator's award by a court:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

363 U.S. at 597. This standard has been consistently and successfully applied since it was established.

The United States Court of Appeals for the Eighth Circuit in this case, however, issued a decision which is in direct conflict with the standard set forth in *Enterprise Wheel and Car*. In this case, the uncontradicted and undisputed evidence adduced at the arbitration hearing unequivocally established that the parties had entered into a settlement agreement to resolve the question of whether Grievant could comply with the Company's mandatory policy requiring employees to wear back belts at work. In fact, at

the arbitration hearing, Grievant admitted that such an agreement had been reached. This settlement agreement was reached by the parties through a series of negotiations governed by the parties' ongoing obligation under the National Labor Relations Act, 29 U.S.C. § 158(a)(5) to bargain in good faith throughout the course of the parties' relationship. In *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 578 (1960), this Court held:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. *See* Shulman, Reason, Contract and Law in Labor Relations, 68 Harv. L. Rev. 999, 1004-1005. The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant.

The Court further stated:

> The labor arbitrators' source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it.

Id. at 581. Accordingly, inasmuch as the settlement agreement reached by the parties was part of the parties' employment relationship and a part of the common law of the shop, it is beyond purview that the settlement agreement reached by the

parties was a part of the Collective Bargaining Agreement at the time the Arbitrator issued his Award. [1]

Despite this fact, the Arbitrator, in issuing his Award, expressly stated that he would not consider undisputed and uncontradicted evidence establishing the existence of the settlement agreement between the parties which went to the essence of the parties' Agreement. Stated another way, the Arbitrator admitted that the uncontradicted evidence adduced at hearing established the parties entered into a settlement, but he decided, as he expressly stated, that he would not base his holding on this "undertaking" between the parties. Pet App. 41a. As a result, the express words used by the Arbitrator in his Award manifest an infidelity to his obligation to issue an award that draws its essence from the parties' Agreement and his conclusion is in direct conflict with this Court's decision in *Enterprise Wheel and Car.*

The United States Court of Appeals for the Eighth Circuit exacerbated the Arbitrator's error by reversing the district court and ordering that the Arbitrator's Award be enforced. The decision of the Eighth Circuit Court of Appeals completely departs from thirty-five (35) years of Supreme Court precedent and allows an arbitrator to circumvent his obligation — to interpret the parties' Collective Bargaining Agreement in issuing an Award that draws its essence from the parties' Collective Bargaining Agreement — by ignoring and refusing to consider undisputed and uncontradicted evidence that goes to the essence

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1. In *Coca-Cola Bottling Company of St. Louis v. Teamsters, Local 688*, 959 F.2d 1438 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 635 (1993), the Eighth Circuit ruled that an arbitrator is bound by the terms of a settlement agreement reached by the parties. In addition, in *Bakers Union Factory v. ITT Continental Baking Company, Inc.*, 749 F.2d 350 (6th Cir. 1984), the Sixth Circuit Court of Appeals held an arbitrator is presumptively bound by the terms of a settlement agreement.

of the parties' Agreement. By way of example, a company and a union could negotiate and agree on an attendance policy providing that any employee with ten (10) tardies is automatically terminated. The company could then terminate an employee who has ten (10) tardies. After the filing of a grievance the company could prove at arbitration that the employee had ten (10) tardies while the union could adduce absolutely no evidence contradicting the existence of the agreement or the fact the employee engaged in conduct in violation of the agreement. Pursuant to the Eighth Circuit Court of Appeals' decision in this case, the Arbitrator could lawfully find that the employee was not discharged properly by simply stating he would not consider the parties' side agreement in issuing his Award. Clearly, any such action by the Arbitrator constitutes an infidelity to his obligation to interpret the parties' Collective Bargaining Agreement and issue an Award that draws its essence from the parties' Collective Bargaining Agreement and, accordingly, under this Court's decision in *Enterprise Wheel and Car*, any such award by an arbitrator would be unenforceable. This is precisely what happened in this case. The Arbitrator expressly stated that he would *not* consider undisputed and uncontradicted evidence going to the essence of the parties' Agreement. Accordingly, the Arbitrator's own words manifest an infidelity to his obligation to issue an Award that draws its essence from the parties' Collective Bargaining Agreement. As a result, by reversing the district court's decision and ordering that the Arbitrator's Award be enforced, the United States Court of Appeals for the Eighth Circuit has issued a decision in direct conflict with this Court's decision in *Enterprise Wheel and Car.* Therefore, the Company's petition for writ of certiorari should be granted.

Finally, in *United Paperworkers International Union, AFL-CIO, et al. v. Misco, Inc.*, 484 U.S. 29 (1987), this Court explained that the reason arbitrators' awards are insulated from judicial review is because of the decided preference in favor of the private settlement of labor disputes:

> The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government: the Labor Management Relations Act of 1947, 61 Stat. 154, 29 U.S.C. § 173(d) provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

484 U.S. at 37. In order for private settlements to be effective, both parties must be willing to live up to their commitments.[2] In this case, however, the Union refused to live up to its commitment. Rather, the Union specifically asked the Company to allow Grievant to get a second medical opinion. Although not obligated to provide Grievant with this second opinion, the Company, in an effort to foster the relationship between the parties, allowed Grievant an additional medical diagnosis premised upon the parties' express agreement that the diagnosis of the second doctor would resolve the parties' dispute. Upon receiving the diagnosis of the second doctor, both Grievant and the Union acted in direct contravention of the parties' agreement. Ultimately, after refusing to live up to its commitment as contained in the parties' agreement, the Union filed a grievance and the case proceeded to arbitration.

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2. The well established federal labor policy favoring the private settlement of disputes has also been recognized by several United States Courts of Appeals. *See Bakers Union Factory v. ITT Continental Baking Company, Inc.*, 749 F.2d 350 (6th Cir. 1984); *United Mine Workers v. Barnes & Tucker Company*, 561 F.2d 1093, 1096 (3d Cir. 1977).

In issuing his Award, the Arbitrator acted in direct contravention to the well-accepted policy favoring the private settlement of disputes by affirmatively stating he would not consider the parties' settlement agreement. After the district court vacated the Arbitrator's Award, the United States Court of Appeals for the Eighth Circuit also acted in direct contravention to federal labor policy favoring the private settlement of disputes as established in *Misco* by condoning the Arbitrator's disregard for the parties' private settlement of their dispute. In sharp contrast to the federal labor policy which encourages the private settlement of disputes, the decisions of both the Arbitrator and the United States Court of Appeals for the Eighth Circuit essentially punish the Company for entering into a settlement agreement with the Union to resolve the matter in dispute. If the decision of the Eighth Circuit Court of Appeals is allowed to stand, it will have an adverse and possibly chilling effect on the federal labor policy established in *Misco* because companies will be unwilling to engage in the private settlement of labor disputes if such settlements can be rendered meaningless by an arbitrator who simply chooses to ignore the existence of the agreements. As a result, because the decision issued by the Eighth Circuit Court of Appeals is in direct conflict with the preference for the private settlement of labor disputes established by this Court in *Misco*, the Company's petition for writ of certiorari should be granted.

CONCLUSION

In conclusion, the decision of the United States Court of Appeals for the Eighth Circuit directly conflicts with this Court's decisions in *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960) and *United Paperworkers International Union, AFL-CIO, et al. v. Misco, Inc.*, 484 U.S. 29 (1987). Accordingly, for the reasons stated above, this Court should grant the Company's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JULY 31, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3895

Shop 'N Save Warehouse Foods, Inc.,

Appellee,

v.

United Food and Commercial Workers International Union, Local No. 88,

Appellant.

Appeal From the United States District Court for the Eastern District of Missouri.

Submitted: June 15, 1995

Filed: July 31, 1995

Before BOWMAN, Circuit Judge; HEANEY, Senior Circuit Judge; and MORRIS SHEPPARD ARNOLD, Circuit Judge.

HEANEY, Senior Circuit Judge.

The United Food and Commercial Workers International Union, Local Union No. 88 (the Union) appeals from the district court's decision setting aside an arbitrator's ruling that Sam Coffey, a Shop 'N Save Warehouse Foods employee and a

union member, was terminated in violation of the parties collective bargaining agreement. We reverse the district court and sustain the arbitrator's award.

Sam Coffey, an employee of Shop 'N Save Warehouse Foods, Inc. (the Company) seriously injured his back while at work on April 16, 1992. His treating physician authorized Coffey to return to work on May 18. On August 7, 1992, the Company furnished back belts to each employee pursuant to a new company policy requiring all employees to wear back belts. By the time the belts were issued, Coffey had returned to work. Although Coffey wore the belt for a short time, he discontinued the practice because he believed the belt was aggravating his back injury.

The Company scheduled an appointment with Coffey's treating physician, Dr. Noguera. Dr. Noguera initially recommended that Coffey refrain from wearing the belt for one week. After a second examination, he returned Coffey to full duty and stated that Coffey was medically able to wear the belt. However, Coffey refused to wear the belt and cited comments made by Dr. Noguera that the belt could be harmful because it prevented full range of movement.

The Union then asked the Company to obtain another medical opinion to determine whether Coffey could wear the back belt. The Company agreed and referred Coffey to Dr. Rosenbaum, a clinical neurologist. Coffey submitted to the examination. Dr. Rosenbaum stated that Coffey could use the belt. Meanwhile, Coffey sought a third opinion from Dr. Cohen, also a neurologist. Dr. Cohen reported that the belt aggravated Coffey's condition and that Coffey did not need to wear the belt.

Coffey's refusal to wear the belt continued. As a result, the Company refused to let Coffey work and considered him to have resigned. Contending that he had been terminated without cause in violation of the collective bargaining agreement, Coffey filed a grievance with the Union. The parties were unable to resolve the grievance, and the matter was submitted to arbitration. The arbitrator determined that (1) the request for arbitration was timely; (2) the purpose of the back belt rule was personal safety, and the employee had a reasonable belief that wearing the belt was unsafe, thus failure to comply with the back belt rule is excused; (3) the grievance had not been settled by the Company and the Union, and the Company had not asked the arbitrator to enforce the settlement agreement; and (4) the back belt rule did not specify punishment for failure to abide by the rule. As a result, the arbitrator ordered that Coffey be reinstated with back pay.

The Company asked the district court to set aside the arbitrator's decision. The district court granted the Company's motion for summary judgment. The court held that the arbitrator exceeded his authority by disregarding the "last chance settlement agreement."

In view of the fact that the Company raises a single issue on appeal, we will limit our review to that issue, namely, did the Union and the Company enter into a "last chance settlement agreement." The arbitrator said no, and we accept that decision. We do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. *United Paper Workers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987).

The district court relied upon *Coca Cola Bottling Co. v.*

Teamster Local 688, 959 F.2d 1438 (8th Cir.), *cert. denied*, 113 S. Ct. 635 (1992), in reaching its decision. Nothing in this opinion undercuts the rationale or validity of our opinion in *Coca-Cola*. However, *Coca-Cola* presented a different set of facts. In that case an employee was charged with violating three work rules. He filed a grievance, which progressed to the final level, termination. As a result of a meeting held to resolve the grievance, the employee was suspended for ten days without pay, and the parties agreed to a disciplinary notice. It read as follows:

> Notwithstanding the above discipline, please be advised that the Company considers a continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination of [sic] next such occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary action for similar infractions by any employee in the future.
>
> . . . .
>
> Final Notification
>
> Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis.

Id. at 1439. The employee committed further violations of the rules, and the company terminated his employment. The matter was taken to arbitration. The arbitrator ordered the employee reinstated. The district court vacated the award, and we affirmed the district court. We stated:

> The basis for our decision is the agreement executed by the Union stewards and the Company representatives at the time [the employee] reached the fifth and final level of discipline. At this level he was subject to discharge, and the agreement, while giving him another opportunity to correct the deficiencies in his job performance, provided for his discharge in the event he did not. This agreement clearly was a "last chance" agreement, that is, a "contract[ ] between [employer] and employee to suspend disciplinary action pending a probationary period in which the employee is afforded a chance to improve his or her performance." *United States Dep't of the Air Force v. Federal Labor Relations Auth.*, 949 F.2d 475, 477 (D.C. Cir. 1991). "If the employee fails to measure up as promised in a last chance agreement, the [employer] may proceed to administer the discipline earlier suspended," *id.* at 478, without reference to the collective bargaining agreement.

Id. at 1440.

Appendix A

In the instant case, the arbitrator did not ignore a last chance agreement. Rather, he questioned the existence of such an agreement. He stated:

> In essence, the Company argues that the case was settled on September 3rd. Yet if a settlement did take place, then it follows there would be some action to enforce the settlement rather than a submission asking the Arbitrator to decide whether the Grievant either voluntarily quit or was discharged for cause. In the absence of such a submission, the Arbitrator believes it more appropriate to base his holding on the limited power he derives from the bargaining agreement rather than to assume he can both adjudicate and enforce an undertaking to which he was not a party and which is outside the grievance procedure.

Award of Arbitrator, at 17, Appellant's App. at 679. Moreover, in his statement of facts, the arbitrator did not state that a settlement agreement clearly existed. The arbitrator stated:

> On August 27, 1992 the Union President talked with the Human Resources Manager and asked if another medical opinion could be secured. *Company* evidence *indicated* that the Union agreed to accept the results of the examination.

Id. at 4 (emphasis added).

Appendix A

If the arbitrator had found that a settlement agreement had been consummated and then failed to enforce that agreement, the result would be the same as in *Coca-Cola*. However, the arbitrator made no such finding. The district court cannot thereafter make its own factual findings.

We reverse and remand to the district court with directions to enforce the arbitrator's award.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI FILED OCTOBER 14, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:93CV01437 GFG

SHOP 'N SAVE WAREHOUSE FOODS, INC.,

Plaintiff,

vs.

UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO-CLC, LOCAL NO. 88,

Defendant.

ORDER AND JUDGMENT

Pursuant to the memorandum filed on this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Shop N' Save Warehouse Foods, Inc.'s cross motion for summary judgment shall be and it is granted in plaintiff's action to set aside the arbitrator's award and in defendant's counterclaim to uphold the award.

IT IS FURTHER ORDERED that defendant United Food and Commercial Workers, AFL-CIO-CLC, Local No. 88's motion for summary judgment shall be and it is denied.

Appendix B

IT IS FURTHER ORDERED that defendant's motion to strike second affirmative defense of plaintiff shall be and it is denied as moot.

IT IS FURTHER ORDERED that plaintiff's request for oral argument shall be and it is denied as moot.

Dated this 14th day of October, 1994.

s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:93CV01437 GFG

SHOP IN 'N SAVE WAREHOUSE FOODS, INC.,

Plaintiff,

vs.

UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO-CLC, LOCAL NO. 88,

Defendant.

MEMORANDUM

This matter is before the Court on the parties' cross motions for summary judgment. Plaintiff Shop 'N Save Warehouse Foods, Inc. (Shop 'N Save) filed this action under the Labor Management Relations Act, 29 U.S.C. § 185, to set aside the arbitrator's award in a dispute related to Shop 'N Save's discharge of an employee, Sam Coffey, covered by the collective bargaining agreement between Shop 'N Save and defendant United Food and Commercial Workers, AFL-CIO-CLC, Local No. 88 (United Food). United Food filed a counterclaim to enforce the award.

At the time of the occurrences underlying this lawsuit, Shop 'N Save and United Food were parties to a collective bargaining agreement entered into pursuant to the provisions of the Labor

Appendix B

Management Relations Act, as amended 29 U.S.C. § 141 et seq. On September 3, 1992, Coffey's employment with Shop 'N Save ceased as a direct consequence of his unwillingness to continue wearing the required back belt.

The following facts are not in dispute. On April 24, 1992, Shop 'N Save instituted a work rule mandating that employees, including all meat cutters such as Coffey, wear back belts while performing their duties at work. The letter announcing the new policy did not outline the manner in which the back belt policy was to be enforced or the range of discipline to be imposed in the event of noncompliance with the policy.

On August 15, 1992, Coffey addressed with Shop N' Save his concerns arising from the newly implemented back belt policy citing the aggravation of a pre-existing back injury. After examining Coffey in response to his complaint, Dr. Noguera concluded that he was not wearing the brace as intended and suggested that he be allowed to return to work not wearing the back belt for one week. On August 25, 1992, Dr. Noguera re-examined Coffey and determined he was medically capable of wearing the back belt at work. Jenny Sullins, claims administrator for Shop N' Save, contacted Coffey on August 26, 1992 and informed him that he was to return to work wearing the back belt.

Thereafter United Food officers contacted Sullins and requested that Coffey be afforded a second medical opinion.[1] After examining him on September 3, 1992, Dr. Rosenbaum

---

1. The Court notes that in support of its position United Food attached a letter from Dr. Cohen, a physician selected and paid for by Coffey, advising Coffey that continued wearing of the back belt would aggravate his back problems.

determined in writing that Coffey was capable of wearing the back belt at work. Due to his refusal to abide by the agreement and follow the determination of Dr. Rosenbaum, Shop 'N Save terminated Coffey for insubordination.

On September 4, 1992, United Food filed a grievance on behalf of Coffey alleging his wrongful discharge in violation of Article 5 of the collective bargaining agreement in effect at that time. Article 5 of the collective bargaining agreement in relevant part provides: "The management of the business and the direction of the working forces, including the right to . . . suspend or discharge for proper cause . . . , shall be vested in the Employer."

United Food thereafter demanded that Shop 'N Save submit to arbitration the grievance of Coffey pursuant to Article 6 of the collective bargaining agreement. The parties selected Thomas Erbs to preside over the hearing on March 17, 1993 and decide the matter of the grievance. On June 7, 1993, Arbitrator Erbs issued his award by rejecting the parties' agreement and sustaining the grievance of Coffey. Based on the evidence presented before him, the arbitrator found in his award:

> On August 27, 1992, the Union President talked with the Human Resource Manager and asked if another medical opinion could be secured. Company evidence indicated that the Union agreed to accept the results of the examination by the third physician. The Company arranged for the Grievant to be examined by Dr. Rosenbaum, a clinical neurologist. Dr. Rosenbaum found no evidence of medical disorder nor any reason why the Grievant could not wear the belt. . . .

Appendix B

> Yet if a settlement did take place, then it follows there would be some action to enforce the settlement rather than a submission asking the Arbitrator to decide whether the Grievant either voluntarily quit or was discharged for cause. In the absence of such a submission, the Arbitrator believes it more appropriate to base his holding on the limited power he derives from the bargaining agreement rather than to assume he can both adjudicate and enforce an undertaking to which he was not a party and which is outside the grievance procedure.

During the arbitration hearing, United Food never denied that the parties had reached an agreement to resolve the disputed matter and never offered any testimony to contradict the testimony of Shop N' Save.

Pursuant to the Labor Management Relations Act, 29 U.S.C. § 181 et seq., Shop 'N Save challenges the June 7, 1993, arbitration award directing Shop 'N Save to reinstate Coffey to his former position with full back pay and no loss of seniority or benefits. To date Shop 'N Save has refused to comply with the arbitrator's decision and filed its complaint to vacate the award before this Court. Shop 'N Save contends that the arbitrator ignored the parties' oral settlement agreement wherein the parties agreed that if cleared to work wearing a back belt by Dr. Rosenbaum, Coffey would be required to work with a back belt. The parties filed cross motions for summary judgment.

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if he can "show that

there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *First Sec. Sav. v. Kansas Bankers Sur. Co.*, 849 F.2d 345, 349 (8th Cir. 1988). In passing on a motion for summary judgment, a court is required to view the facts and inferences that reasonably may be derived therefrom in the light most favorable to the non-moving party. *Holloway v. Lockhart*, 813 F.2d 874, 878 (8th Cir. 1987). The burden of proof is on the moving party and a court should not grant a summary judgment motion unless it is convinced that there is no evidence to sustain a recovery under any circumstances. *Foster v. Johns-Manville Sales Corp.*, 787 F.2d 390, 392 (8th Cir. 1986). As the Supreme Court has stated:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The scope of judicial review of arbitration awards under collective bargaining agreements is highly deferential and extremely limited:

> The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on error of fact or on misinterpretation of the contract. . . . As long as the arbitrator's award "draws its essence from the collective bargaining

agreement," and is not merely "his own brand of industrial justice," the award is legitimate.

United Paperworkers Int'l Union v. Misco. Inc., 484 U.S. 29, 36 (1987), (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). It is not within the province of the courts to review the merits of a particular award. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 596. Rather, the Court must determine whether the arbitrator's award in this case "draws its essence from the collective bargaining agreement." *Id.* at 597. The arbitrator's role is to interpret and apply the parties' agreement. *Id.* If the arbitrator construes or applies the contract, and acts within the scope of his authority, his decision may not be overturned. Moreover, the arbitrator has the discretion to resolve any ambiguities in the contract. *Manhattan Coffee Co. v. International Brotherhood of Teamsters, Local No. 688*, 743 F.2d 621, 623 (8th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985). The arbitrator's resolution of ambiguous contract provisions will be enforced provided that they draw their essence from the contract. *Id.; International Bhd. of Elec. Workers, Local Union 53 v. Sho-Me Power Corp.*, 715 F.2d 1322 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

"In determining whether an arbitrator has exceeded his authority, the agreement must be broadly construed with all doubts being resolved in favor of the arbitrator's authority." *Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union. AFL-CIO & CLC*, 706 F.2d 228, 230-31 (8th Cir. 1983) (en banc); *see also, International Bhd. of Elec. Workers. Local 53 v. Show-Me Power Corp.*, 715 F.2d at 1324-25 & fns. 1 & 2. Nevertheless, "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit

to dispense his own brand of industrial justice." *Steelworkers of America v. Enterprise Wheel & Car Corp.*, 863 U.S. at 597.

The arbitrator in this case disregarded the oral settlement agreement even though such agreements are binding in arbitration. *Coca-Cola Bottling v. Teamsters Local 688*, 959 F.2d 1438 (8th Cir.), *cert. denied*, 113 S. Ct. 635 (1992); *International Union, United Mine Workers v. Big Horn Coal Co.*, 916 F.2d 1499, 1502 (both Cir. 1990). If an arbitrator in reaching his award ignores or disregards a last chance agreement, his award must be vacated. *Coca-Cola Bottling v. Teamsters Local 688*, 959 F.2d at 1442. To be enforceable, a last chance agreement must be "sufficiently specific as to be capable of implementation. Courts will not enforce a settlement agreement that is vague, ambiguous, incomplete or unclear in its meaning and effect." *United Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1097 (3d Cir. 1977).

The arbitrator disregarded the oral agreement of the parties even though Coffey acknowledged its existence in his testimony during the hearing. Furthermore, the arbitrator acknowledged its existence by finding in his award that United Food agreed to accept the results of the examination of Dr. Rosenbaum. After the initial examination by Dr. Noguera, Sullins informed Coffey that Shop N' Save expected Coffey to return to work wearing the back belt. United Food's president requested that Coffey be afforded a second medical opinion and agreed that this opinion would resolve the matter. The parties agreed to abide by Dr. Rosenbaum's diagnosis with respect to the issue of whether Coffey could wear a back belt as mandated by the work rule despite his alleged medical hardship. Shop N' Save's scheduling of the appointment with Dr. Rosenbaum and Coffey's attendance at the appointment evidence the performance of the oral

agreement between the parties. Subsequently, Coffey breached the agreement by refusing to work with the back belt and Shop N' Save terminated him for insubordination.

Upon review of the record, the Court finds the parties entered into an oral agreement to resolve the matter. In constructing his award, the arbitrator not only acknowledged its existence, he acknowledged the conduct in violation of the agreement, but he failed to abide by the terms. The parties through their authorized agents continued the collective bargaining process by entering into an express agreement that Coffey's ability to work while wearing the back belt would be resolved by the medical diagnosis of Dr. Rosenbaum. Accordingly, the Court concludes that here the arbitrator acted outside his authority in interpreting the collective bargaining agreement and that his award failed to draw its essence from the collective bargaining agreement by disregarding the oral agreement between the parties.

Dated this 14th day of October, 1994.

s/ George F. Gunn
GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING REHEARING DATED AUGUST 29, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3895EMSL

Shop 'n Save Warehouse Foods, Inc.,

Appellee,

vs.

United Food and Commercial Workers International Union, Local No. 88,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

The petition for rehearing filed by the appellee's has been considered by the court and is denied.

August 29, 1995

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals , Eighth Circuit

APPENDIX D — AWARD OF ARBITRATOR

IN THE MATTER OF THE ARBITRATION

Between

SHOP 'N SAVE WAREHOUSE FOODS, INC. St. Louis, Missouri

And

UNITED FOOD AND COMMERCIAL WORKERS AFL-CIO-CLC, LOCAL NO. 88

Before Thomas J. Erbs, Arbitrator

FMCS #93-02661

Grievance of Sam Coffey

Appearances:

For the Company:

Robert W. Stewart — Attorney
John T. Dougherty —Vice President — Human Resources
Larry J. Lewis — Manager — South County Store
Jenny Sullins — Claims Administrator
Solomon Noguera — Medical Doctor
Herbert Rosenbaum — Medical Doctor
O.T. Cousins — Union Steward
Mike Wille — Meat Manager
Dewayne Jacobs — Sales Rep. — Green Guard
Jayme Lewis — Sales Rep. — Green Guard

Appendix D

For the Union:

Donald Kenneth Anderson — Attorney
Sam J. Coffey — Grievant
Peggy Adams — Business Agent — Vice President of Local

AWARD OF ARBITRATOR

This is a voluntary labor arbitration between Shop 'N Save Warehouse Foods, Inc., St. Louis, Missouri, hereinafter called the "Company", and Local No. 88 of United Food and Commercial Workers, AFL-CIO/CLC, hereinafter called "Union", and concerns the grievance filed by Sam J. Coffey, hereinafter called the "Grievant", over the termination of his employment.

When the parties were unable to satisfactorily resolve the dispute in the grievance procedure the matter proceeded to arbitration before Thomas J. Erbs, an arbitrator selected by the parties from a panel provided to them by the Federal Mediation and Conciliation Service. This procedure is in accordance with the contract between the parties which was entered into on November 2, 1989. The contract expired on September 26, 1992, but some of the negotiations leading up to subsequent contract took place immediately after the Grievant's termination of employment.

The hearing was held at the office of the Company's attorney in St. Louis County, Missouri on March 17, 1993 and at that time the parties presented their respective cases through sworn and transcribed testimony and the introduction of various exhibits. The parties have also filed capable briefs setting forth their

respective positions in regard to the issue raised the last of which was received on May 6, 1993.

The Grievant had been employed by the Company as a journeyman meat cutter since some date subsequent to 1990. He testified that he had been working at various other markets, including Kroger, for ten (10) years prior to the time that Kroger left the St. Louis area. He then worked out of the Union Hall for approximately one (1) year, including some time at National Food Stores, and also at the Company. He was then hired by the Company as a journeyman meat cutter. In 1991 he was working in the O'Fallon store. While there he was issued three (3) warnings concerning his work. He and the Business Agent testified that in grievance discussions over those disciplines they were to have been removed from his file. The Company acknowledges that those warnings are not the basis of any discipline involved in the instant case.

In April of 1992 the Grievant slipped and fell while he was assigned to the South County store. He suffered some back spasms at that time. This occurred on the same date he received both oral and written warnings for defective/improper work for incidents on April 11 and April 13, 1992. The Grievant testified that this is the only accident that he has ever had at any place of-employment.

The Grievant was taken to the local Med Stop and was treated by Dr. Noguera. X-rays were taken and the Grievant was advised to be off of work until April 21, 1992. However, the Grievant was off of work for approximately four (4) weeks. When he returned to work on May 12, 1992 he returned with no medical restrictions. He had filed a Workmen's Compensation claim and that claim was still pending in September 1992 when the events precipitating his employment termination occurred.

Appendix D

In April of 1992 the Union was advised that the Company would be fitting all employees with back braces, and that the employees would be required to wear a back brace while on duty as a preventative measure to avoid back injuries. The braces were supplied by the Company at no cost to the employees. These braces cost approximately $24.00 apiece. The Union advised the Company that although the program had merit, the utilization of the brace would preferably be on an optional, voluntary basis. The Company's immediate response was that the wearing of braces would be deemed mandatory. The Union did not grieve the implementation of the mandatory back brace rule.

The back braces were not introduced in the South County Store where the Grievant was stationed until August 7, 1992. At that time one of the back devices, known as an Airtemp Advantage from Safeguard Technology, was provided. The literature that comes with each such device was also distributed. The literature contains instructions on the approved method to wear the belt. The Airtemp Advantage device will hereinafter be called the "belt."

Dr. Noguera's examination on April 16, 1992 indicated the Grievant had suffered a lower lumbar strain. There was no record of any medical treatment given to the Grievant from May 13, 1992 until subsequent to the introduction of the belt in his store.

The Grievant testified that he began wearing the belt in early August. He testified that prior to that time he still had a few spasms and did not have as much flexibility. After wearing the belt he noticed that he was having some back problems. He advised the Store Manager that the belt was hurting him. On August 18th he went back to Dr. Noguera and advised the doctor that he was having problems with the belt. The August 18, 1992

report from Dr. Noguera's office indicates that the Grievant may return to work, but that he was not to wear the belt. The Grievant stated that this restriction was to last for one (1) week. Dr. Noguera testified that he felt that the Grievant was wearing the belt improperly. The Grievant testified that statements made by Dr. Noguera about the belt scared him. Dr. Noguera allegedly told him to wear the belt loose and that the belt could do more harm than good because the belt did not allow full range of movement.

The Grievant went back to the Company and advised the Company of Dr. Noguera's comments. He was told that he could not work without the belt. Apparently for the rest of that week he did receive disability pay. The Grievant called the Union during that week and the Union then called the Company.

On August 27, 1992 the Union President talked with the Human Resources Manager and asked if another medical opinion could be secured. Company evidence indicated that the Union agreed to accept the results of the examination by the third physician. The Company arranged for the Grievant to be examined by Dr. Rosenbaum, a clinical neurologist. Dr. Rosenbaum found no evidence of medical disorder, nor any reason why the Grievant could not wear the belt. This examination was conducted on September 3, 1992.

On the day prior to the visit with Dr. Rosenbaum the Grievant had been scheduled by his workmen's compensation attorney to be examined for his workmen's compensation claim. He saw Dr. Raymond Cohen, DO, a Board Certified Neurologist. The Grievant had not previously seen Dr. Cohen, nor did he see Dr. Cohen subsequent to his September 2nd examination. Dr. Cohen provided the following statement which was shown to Dr. Rosenbaum:

Appendix D

> "Mr. Sam Coffey was seen and evaluated by me in the office on today's date. It is my medical and neurological opinion that this man does not need to wear this lumbar belt. This belt aggravates his condition and it is further my opinion that he does not need to wear this belt.
>
> "If you have any questions regarding this man's neurological evaluation, please feel free to contact me at my office."

The Grievant did not testify as to the extent of the examination performed by Dr. Cohen. The Grievant did state that he had taken the belt to show Dr. Cohen when he went in for his worker's compensation examination.

Dr. Rosenbaum and Dr. Noguera both testified that one of the prime purposes of the belt is to cause an awareness so that persons lift properly. There was some indication that the belt could be characterized as a support belt, and the sales personnel for the vendor indicate that there is some support provided. Dr. Rosenbaum indicated that the belt is not a dangerous device and he disagreed with Dr. Cohen's opinion. He further stated it would be very unlikely that the belt, if used properly, would cause any atrophy of any of the muscles. He did not feel, in his opinion, there would be any false sense of security if the belt was worn properly.

The Union Steward testified that the employees were given instructions on how to wear the belt. The Grievant apparently was not at that initial instruction. After complaining about the belt he did receive special instructions on how to wear the belt from the

manufacturer's sales representative. Company personnel testified that to their knowledge everybody wears the belt although since the meat cutters wear a coat over their belts it is not always visible.

The Human Resources Manager testified that the belts were introduced as a pro-active measure in order to reduce the number of back injuries. The Company paid for the belts and required all of the employees to wear the belt.

The Human Resources Manager acknowledges that if the Grievant had conflicting medical opinions the situation for him might be difficult. However, he stated that one other employee who had a problem with the belt came to the Company. As a result a specific belt was designed for that person. There had been no other situations of employees refusing to wear the belt.

The belt itself contains the following warning:

> "Warning. This is only a support belt and should not be considered a remedy for back problems. If you are under the care of a health care practitioner, consult with him/her before using this belt. This belt will not guarantee freedom from all back strain. Always utilize good judgment and proper lifting techniques especially when objects are below 30 inches from the floor. This belt is not to be used as a safety device with a tether line against slipping and falling. This belt is not a flotation device."

The Grievant, after visiting Dr. Rosenbaum, returned to the

Company and presented the note from Dr. Rosenbaum, and at the same time he exhibited the letter from Dr. Cohen. There is a dispute about what was said exactly. According to the Company he told Manager Lewis that he was not going to wear the belt. Lewis called Human Resources Director Dougherty while the Grievant was there. He told Dougherty that the Grievant would not wear the belt. The Grievant says he did not have to wear the belt because he had a doctor's excuse. The parties disagree as to what happened next. The Grievant claims he told Lewis that he would wear the belt, but that Lewis told him he was terminated for not following Company policy, and that Dougherty was tired of his "crap" about the belt. The Company witnesses indicate that the Grievant refused to wear the belt and resigned. There was a dispute as to whether any Company official read Dr. Cohen's note at that time.

The grievance was filed on September 4, 1992 and states as follows:

> "Company terminated him without just cause."

The grievance, which was filed by the Business Agent, cites violation of Article 5 and requests reinstatement without loss of pay, benefit, seniority etc.

On September 15, 1992 the Company responded as follows:

> "I received your letter dated September 4, 1992 in which you state that a grievance was filed by Sam Coffey because Shop 'N Save terminated him without just cause.

Appendix D

> "Let me clarify a few points. When Sam walked off the job, we considered him to have resigned. Sam was given the option of complying with the Company's rules and regulations which he elected not to do. I was on the phone with Store Manager Larry Lewis when, in front of other witnesses, I overheard Sam tell Larry that he would take his chances and hope he was doing the right thing.
>
> I do not see where the Company terminated Sam without just cause, however, if you wish to further discuss this matter, please call me with some available dates to set up a meeting with Larry and I."

The Company heard nothing further from the Union until receipt of a letter, on October 19, 1992 from the Business Representative. That letter was dated October 15, 1992 and cites a deadlock over the grievance and requests arbitration. The Company immediately responded contesting the arbitrability of the matter.

Evidence indicated that during the period from September 15 to October 15 the parties were in negotiations for the current contract. The contract between the parties requires that a grievance be filed within five (5) days of the occurrence at Step One and then contains time limits for Step 2 and Step 3, but there is no specific time limit as to when a request for arbitration must be made. The Business Representative testified that with the negotiations going on, and with some family health problems she had, it was some days before the Union Executive Board could meet to determine whether the grievance should be pursued. It was pursued within a reasonable time thereafter.

Appendix D

ISSUES

Is the grievance arbitrable? If the grievance is arbitrable, was the Grievant's seniority broken under the contract? If the Grievant's seniority was not broken under the contract, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

"ARTICLE 5 MANAGEMENT'S RIGHTS

(a) The management of the business and the direction of the working forces, including the right to plan, direct and control operations, hire, suspend or discharge for proper cause, transfer or relieve employees from duty because of lack of work or for other legitimate reasons, shall be vested in the Employer, provided however, that it will not be used for the purpose of discrimination against any employee.

* * * * *

ARTICLE 6 GRIEVANCE AND ARBITRATION PROCEDURES

* * * * *

Step 4.

* * * * *

Appendix D

(c) The arbitrator shall have no authority to alter in any way the terms and conditions of this contract, and shall confine his decision to a determination of the facts and an interpretation and application of this contract.

(d) Grievances alleging unfair discharge must be submitted in writing to *the labor relations department of the Employer* within ten (10) days after the day of discharge asserting that the discharge was improper. Such complaint must be taken up promptly, and if the Employer and the Union fail to agree within forty-eight (48) hours, it shall be referred to Arbitration. Should the Arbitrator determine that it was an unfair discharge, the Employer shall reinstate the employee in accordance with the findings of the Arbitrator, which shall be final and binding. If the arbitrator should award back wages covering the period of the employee's separation from the Employers, the amount so awarded shall be less any unemployment compensation received or compensation which the Employee earned during the period of suspension or discharge. If the decision of the Arbitrator includes back pay, any back pay award shall not be in excess of *twelve (12) months* from the date of discharge or suspension.

(e) Grievances must be taken up promptly, and no grievance, except for wages, will be

considered, discussed or become arbitrable which is presented later than ten (10) calendar days after first occurrence.

COMPANY CONTENTIONS

The Company had the right to introduce the medical records which were presented at the hearing. There had been no request for such information by the Union prior to the hearing. A request of this nature is a prerequisite to management's duty to supply information.

Aside from the above, the grievance is not arbitrable. Article 6, Step 4, Section (d) states that any complaint must be taken up promptly. Here some thirty (35) days elapsed between the date of the Company's answer and the date the Union contended the matter was deadlocked and requested arbitration. Since "prompt" attention to grievances was expressly negotiated, and since "prompt" processing did not occur, the Arbitrator should consider the grievance settled on the basis of the Company's September 15th answer.

The Grievant's seniority was broken on September 3, 1992. Severance occurred whether the Grievant was discharged or voluntarily quit. In fact, both discharges and quits are covered by the relevant provision of the contract (Section 8d).

The Company established the back belt work rule in an effort to maximize safety. The Company provided ample notification to the Union regarding its decision. No grievance was filed over the unilateral implementation of the rule. Union efforts to interject the reasonableness of the rule into this arbitration should be rejected. Not even the Grievant contemplated filing a grievance

over the rule itself, and his present grievance makes no reference to the rule. Consequently, the Company had the right to require its employees to wear back belts and to consider an employee's refusal to wear the belt as a break in said employee's seniority.

Two medical doctors indicated the Grievant was capable of wearing the belt. Dr. Noguera examined the Grievant on August 18, 1992 and again on August 25, 1992. After the second examination Dr. Noguera indicated the Grievant could return to full work duty. The doctor testified there was no medical reason whatsoever to justify the Grievant's refusal to wear the belt. Clearly the Company had the right to expect the Grievant to do so.

In an effort to accommodate the Grievant's displeasure with Dr. Noguera's diagnosis the Company agreed to allow him to see an additional doctor. After this examination Dr. Rosenbaum saw no medical or neurological reason to disqualify the Grievant from wearing the belt. Further, Dr. Rosenbaum could not see that wearing the belt would aggravate any condition the Grievant might have. Based on the physicians' certificates and the lack of medical documentation to support the Grievant's allegations the Company required the Grievant to wear the back belt. His failure to do so was inexcusable.

The Grievant's documentation that he was incapable of wearing the back belt is devoid of merit. No such documentation was produced prior to the incident on September 3, 1992. Yet even if Dr. Cohen's certificate had been produced, the Company was not required to accept it. There was no description of the examination or of the treatment the Grievant received. There was no explanation of the Grievant's injury or why he was incapable of wearing the belt. Moreover, Dr. Cohen's contention that the Grievant did not "need" to wear the belt is irrelevant. Similarly,

while Dr. Cohen's letter stated the back belt aggravated the Grievant's condition, there was no medical explanation for this statement and he never examined the belt itself.

The Company had the right to rely on the medical opinions of Dr. Rosenbaum and Dr. Noguera. The Union had also agreed the Grievant would act in accordance with Dr. Rosenbaum's decision as to the Grievant's ability to wear the back belt. Union efforts to renege on its express agreement violate the principle that a party should not gain through arbitration what it cannot gain through negotiation. Plainly stated, the Grievant's failure to wear the back belt at work on September 3rd was inexcusable, and his self-serving claims that he did not walk away from his job are unpersuasive.

The grievance should be denied.

UNION CONTENTIONS

The Grievant did not voluntarily quit his job with the Company. Rather, he was involuntarily discharged for obeying the recommendation of Dr. Cohen. No evidence whatsoever was presented that the Grievant intended to resign. The Grievant's statement, which was recorded two (2) days after the event, shows he would have worn the belt, and that he both wanted and expected to return to his job. Similarly, the circumstances surrounding the Grievant's separation from employment support that he was discharged. He was told so by Mr. Lewis. Hence, the Company must prove the Grievant's discharge was for "proper cause" under the bargaining agreement. The Company cannot do so.

The Company's evidence does not even make a prima facie

case of proper cause. First, the Company failed to demonstrate the reasonableness of the back belt rule. Likewise, no evidence was presented that any benefit would be derived by implementation of the policy. It was never shown that exempting certain employees with special medical conditions might prove harmful to the program. In the absence of proof of this nature it appears the Grievant was fired simply for refusing to wear, at best, an unproven device. Similarly, the Grievant never failed to wear a back brace while on duty.

The Company's case is full of inconsistencies. The Company's witnesses offered widely diverse testimony on the very purpose of wearing a back belt. Significantly, the Company was unwilling to modify the back belt policy based on Dr. Nogeura's initial diagnosis, but it was more than willing to accept Dr. Rosenbaum's position that the Grievant should wear the belt. Yet Dr. Rosenbaum was blatantly contradictory in his testimony regarding the therapeutic/non-therapeutic character of the belt. His contention that the belt is not a dangerous device is contradicted by the experience of Lee West, whom Dr. Rosenbaum evaluated. He then recommended that she wear a narrower belt to protect against aggravating a pre-existing injury.

The Grievant's concern over his safety if he wore the back belt was reasonable. Such fear is a recognized exception to the "work now-grieve later" rule. The Grievant had every right to rely upon the advice of his physician and not wear the belt. Moreover, all of the evidence points to the fact the Grievant's concern about his back had a basis in fact. Even the warning label affixed to the belt suggests that it could aggravate pre-existing back conditions.

The Company failed to adequately warn the employees of

the range of discipline it would impose for non-compliance with the back belt rule. Even Company witness Wille expressed his belief that non-compliance with belt policy was insufficient grounds for discharge. Similarly, no monitoring efforts were set up to police compliance with the policy, and at least one employee was observed not wearing his belt at work. All in all, the Company was lax in enforcing the rule.

The Union also argues that management failed to make a reasonable inquiry or investigation into the substance of the medical opinions of Drs. Cohen and Rosenbaum. The Company's blanket reliance on Dr. Rosenbaum's summary report does not comport with fundamental fairness or due process. The more persuasive testimony indicates that the Grievant showed Dr. Cohen's letter to Mr. Lewis, just as he had previously shown the letter to Dr. Rosenbaum, who mentioned it in his report. Still, the Company made no effort at all to evaluate the divergent opinions of Drs. Rosenbaum and Cohen.

The present grievance is clearly timely. It was processed promptly, just as the contract requires. The term "promptly" is not defined in the contract. This requires that the term be given its ordinary and popular meaning. Under the circumstances the Union processed the grievance with reasonable speed.

The grievance should be sustained and the Grievant made whole.

Appendix D

DISCUSSION

As to arbitrability:

The Company's procedural argument must be addressed at the outset to determine if the merits of the case can be reached. Specifically, the Company urges that the grievance was not moved to arbitration "promptly" as is required by Article 6, Step 4d. The Union asserts that prompt attention to the grievance did take place and that, in any event, the term "prompt" is nowhere defined in the contract. The Arbitrator finds the Union's argument on this point more persuasive.

In *Keystone Consolidated Industries, Inc.* 71 LA 574 (Cohen, 1978) a grievance languished some 660 days before being appealed to arbitration. In that case Arbitrator Cohen found the union guilty of laches because it unreasonably delayed requesting an FMCS panel, all without excuse or explanation. Yet in coming to his decision Arbitrator Cohen noted that even though the parties had a policy of "prompt grievance processing", they had neglected to set out an express time limit for requesting a panel. In adopting a "rule of reasonableness" in the case Arbitrator Cohen observed that some cases hold ". . . that no time limit may be inferred where the parties' contract fails to so provide" and " . . . although the parties may have intended, a reasonable rather than an exact period, it is the responsibility of both parties to take action and establish the outer limits of a reasonable period," citing *Maclin Co.*, 52 LA 805 (Koven, 1969).

Applied to this case the Arbitrator cannot say that a delay of thirty five (35) days was unreasonable. This is especially so owing to the situation presented by the pending contract negotiations, negotiations where the very issue of wearing belts

was discussed. Further, the delay in this matter does not appear to have been prejudicial or to have worked a hardship on either side. For all these reasons it is the Arbitrator's opinion that the contract does not require, nor would it be proper, to resolve the grievance on the basis of the Company's answer alone. Rather, the case should be addressed on its merits. See, too, *Gaylord Container Corp.* 93 LA 465 (Abrams 1989) (involving a 28 month delay in bringing a contested grievance to arbitration).

As to the merits:

The Company asserts that it has the right to and did promulgate and publish a clear safety rule:

> "All employees are required to wear a back belt while at work."

The Company further asserts that the rule is reasonable and promotes the health and safety of all employees. The Arbitrator agrees the Company had the right to make a rule and that the purpose behind the rule as announced was salutory and reasonable in scope. In fact, the Union conceded as much. It never grieved the implementation of the rule, nor does this grievance challenge its reasonableness.

Yet to support a termination for violating a rule the rule in question should not only be reasonable, but, clearly, it must also be promulgated and published. Herein lies the crux of the case.

What exactly *is* the rule that the Grievant was to obey. The Arbitrator notes at the outset that when the Company disseminated the rule, it distributed both the belt and the manufacturer's written instructions which accompanied it. Both

the instructions and the belt itself include a written directive that the belt should not be used, if under a doctor's care, without prior consultation of a "health care practitioner". Furthermore, the Company recognizes that its employee's safety constitutes the paramount goal. The belt rule is but the means to achieve the goal. Yet if the rule as promulgated literally required use of the belt, even if in direct contradiction to the advice of a health care practitioner, then the rule might be commended for its clarity, but it would probably fail for lack of reasonableness. Contrariwise, if the rule is not to be read literally, but reasonably, then the rule as promulgated and published is unclear and cannot support the Grievant's termination.

If all of the doctors in this matter found the belt to be safe, or if they had all found the belt to be unsafe, then it is unlikely this arbitration would be necessary. But on this record there is a difference of opinion and the rule does not address that type of problem. The fact that the third doctor was allegedly selected "to break the deadlock" may have been a reasonable idea to resolve the dilemma, but this method of resolution was clearly not in the rule as it was promulgated and published.

In the Arbitrator's opinion when the Company adopted the back belt rule it impliedly incorporated the warning which accompanied the belt. That warning can reasonably be interpreted as requiring a "tie breaker". But that warning can also reasonably be interpreted as excusing an employee from wearing the belt if to do so could cause injury, and if reasonable accommodation to the belt could not be made. By its conduct in accommodating a female employee and by agreeing to consult a third physician's opinion at its expense the Company recognized that the rule as announced was not to be literally applied, but was accompanied and potentially modified with a "rule of reason."

Appendix D

But what are the exceptions? Surely an employee should not have to guess at the limits of these exceptions at the peril of his job on the one hand or his health on the other. In the Arbitrator's opinion the exceptions to the rule are a part of the rule itself and have to be promulgated and published in advance of enforcement, not made up as the parties go along in the course of the rule enforcement process.

The question here is whether the Grievant's refusal to wear the belt was excusable. At the hearing a great deal of medical testimony was elicited on both the Grievant's condition and the reasonableness or unreasonableness of his decision not to wear the belt. In fact, the Company urges that it *had* a consensus among the medical certificate(s) which were available at the time of the Grievant's refusal, this along with the Union's agreement to accept Dr. Rosenbaum's opinion. Nevertheless, this was not *all* the medical evidence available at that time, and even Dr. Rosenbaum's letter of September 3rd references Dr. Cohen's certification that the belt aggravated the Grievant's condition and that he (Grievant) did not need to wear it.

After duly considering the record evidence as well as the parties' arguments the Arbitrator agrees with the Union that the seminal issue in the case is not so much what the doctors said about the Grievant, but rather what the Grievant reasonably believed about his condition. In the cited case of *Laclede Gas Co.*, 39 LA 833 (Bothwell 1962) an employee's refusal to perform pumping work was held excused despite the fact he never attempted to perform the assignment and the physician supporting the Grievant's case did not testify. In *Laclede*, as here, it mattered less that the employee might have been able to perform as directed than that he had a reasonable basis to believe that doing so might injure him. In this case even Company

witness Dougherty acknowledged that the Grievant would be in a difficult position because of the conflicting medical opinions. In the Arbitrator's view if the Company states that the purpose of its rule is personal safety and an employee refuses to obey on the grounds of his personal safety and that belief is reasonable, and where the rule has unspecified exceptions in the name of safety, then the failure to comply with the rule is excused. Indeed, even the Company's instruction included the cautionary advice to "always exercise good judgement."

The record supports a conclusion that the basis for the Grievant's refusal to wear the belt was in large part due to Dr. Cohen's evaluation and his letter of September 2nd. That diagnosis obviously ran counter to Dr. Rosenbaum's conclusions and put the question of aggravating the Grievant's back into play. Company arguments regarding Dr. Cohen's opinion that the Grievant did not "need" to wear the belt do not overcome his (Dr. Cohen's) assessment that aggravation of the Grievant's existing condition might occur. Further, whatever the Arbitrator's personal opinion might be of Dr. Cohen's one-time examination of the Grievant, such an assessment does not render the content of the diagnosis any less reliable from the Grievant's point of view. After all, Dr. Cohen is a health care practitioner. The Arbitrator and the Grievant are not. As noted by Arbitrator Bothwell at page 841 of *Laclede.*, supra:

> "As the chairman studies the medical testimony at the hearing he believes it indicates that there is a probability that the grievant could have pumped the 30 to 40 gallons involved in the drip at Childress and Sutherland without injury to his back. But this is not the question that must be answered. The

> question is whether the grievant had a reasonable basis for believing there was risk of injury to his back in completing this assignment. The chairman believes that the medical testimony supports the conclusion that the grievant had a reasonable basis for believing there was such risk of injury.

The evaluation of Dr. Cohen also came close on the heels of Dr. Noguera's August 18th diagnosis that the Grievant should not wear the belt. On this point it may be true that the Company had a right to rely upon its medical doctor's assessment of the Grievant's case especially when the Union President had been consulted previously. Yet, again, such reliance by the Company did not render the Grievant's concern over wearing the belt unreasonable. Nor is such a finding established from the rather equivocal (and disputed) statements exchanged between the Grievant and Mr. Lewis on September 3rd. These statements regarding the Grievant's willingness or unwillingness to wear the belt were made at a time when the Grievant's job was in jeopardy. Under such circumstances an employee may view the risk of injury as secondary to the risk of unemployment. On this record no significant or dispositive conclusions can be drawn from the words exchanged. However, the Arbitrator does conclude that the Grievant did not definitely resign on the day in question.

In coming to the above conclusion the Arbitrator is unpersuaded that the Grievant's refusal to wear the back belt demonstrated an intention to quit his job. Mr. Lewis' conversation with Mr. Dougherty lends supports to this result inasmuch as Mr. Lewis told Mr. Dougherty the Grievant wanted to return to work. Mr. Lewis' later attempt to explain the termination as prompted because the Grievant quit is grounded

more on speculation than on fact. As the various cited cases indicate, it is within the employee's province to resign, not the employer's. See *Hart Cooley Mfg. Co.* 74 LA 612, 614 (Keefe 1980). Nor can the Arbitrator infer the Grievant's intention to quit from Dr. Rosenbaum's opinion that he (Grievant) was "fixed" on not wearing the belt. Proof that the Grievant intended to quit his job has not been established.

The Company also argues that the grievance was resolved based on Dr. Rosenbaum's decision that the Grievant was able to wear the back belt. In essence, the Company argues that the case was settled on September 3rd. Yet if a settlement did take place, then it follows there would be some action to enforce the settlement rather than a submission asking the Arbitrator to decide whether the Grievant either voluntarily quit or was discharged for cause. In the absence of such a submission, the Arbitrator believes it more appropriate to base his holding on the limited power he derives from the bargaining agreement rather than to assume he can both adjudicate and enforce an undertaking to which he was not a party and which is outside the grievance procedure. For the same reasons the Arbitrator properly leaves to the Company its prerogative of republishing its rule in light of this decision.

Finally, the Arbitrator concurs with the Union that as an adjunct to the Company's rule-making authority it must also advise its employees of the effect of failing to obey the rule. Surely those confronted with a new device so closely related to their person have a right to know whether non-compliance will be treated as sufficient grounds for discharge, or whether some lesser form of punishment may be expected. Significantly, Company witness Wille did not view non-compliance with the back belt rule as justifying discharge. While by no means

controlling the issue, such testimony does tend to buttress the idea that an employee needs to know how and by whom the rule will be enforced, and the consequences for failing to obey. At the very least fair play suggests that no employee need guess at whether a one time violation of the back belt rule will cost him or her their job.

The Arbitrator makes the following findings:

1) The general purpose of the mandatory belt rule is reasonable.

2) In its application the rule is unreasonable in that it does not specify the penalty for violation; it does not articulate the modification and/or exceptions that might be made to accommodate an employee with a medical problem.

3) The Grievant did not resign.

4) The Company's action amounted to a termination of the Grievant.

For all of these reasons the Grievant's discharge cannot stand. Accordingly, the Company is ordered to reinstate the Grievant forthwith to his former position with full seniority, no loss of benefits and with full back pay, said back pay to be reduced by any earned compensation and unemployment compensation received by the Grievant during the period of his discharge, all in accordance with Article 6 of the bargaining agreement. Back pay shall accrue to the Grievant subject to the above adjustments from the date of his discharge through and including the date of this award. Further, in the event the Company shall fail to reinstate the Grievant following issuance

of this award back pay shall continue to accrue to the Grievant subject to reduction as called for under the bargaining agreement through and including the date he is actually reinstated. So ordered.

Signed in the County of St. Louis, State of Missouri, this 7th day of June, 1993.

s/ Thomas J. Erbs
Thomas J. Erbs, Arbitrator